THE ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE

DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

FEDERAL ALCOHOL ADMINISTRATION

MONOGRAPH NO. 5

ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

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This monograph embodies the results of investigations made by this Committee's staff and reported by it to the Committee. It reflects the views of the staff; its publication at this time indicates neither approval nor disapproval by the Committee of opinions stated in the report, though the monograph's descriptive matter is deemed by the Committee to be accurate. At a later date, the Committee will conduct hearings at which opportunity will be afforded for discussion of the several agencies described in the series of monographs of which this is a part, as well as discussion of general problems of administrative law. Written communications concerning the matters before the Committee will be gladly received at any time and will be carefully considered.

The Committee's final conclusions and report will be made upon consideration of the staff monographs, the record of its oral examination of the administrative officers, and statements made to it in public hearings or in writing.

The Committee's members are Dean Acheson, Chairman, Ralph F. Fuchs, Lloyd K. Garrison, D. Lawrence Groner, Henry M. Hart, Jr., Carl McFarland, James W. Morris, Harry Shulman, E. Blythe Stason and Arthur T. Vanderbilt.

Walter Gellhorn,
Director.

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FEDERAL ALCOHOL ADMINISTRATION*

Introduction

The Federal Alcohol Administration was created by the Act of August 29, 1935, c. 814,[1] whose title stated its purpose to be to "further protect the revenue derived from distilled spirits, wine and malt beverages, to regulate interstate and foreign commerce and enforce the postal laws with respect thereto, to enforce the twenty-first amendment, and for other purposes." The Administration succeeded to the role previously played by the Federal Alcohol Control Administration, an agency established under the provisions of the National Industrial Recovery Act.[2] At the present time, it is a division of the Treasury Department and is headed by an Administrator appointed by the President by and with the advice and consent of the Senate.[3]

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1. 49 Stat. 977, 27 U.S.C.A. § 201 et seq. (Supp. 1935), as amended by the Act of June 26, 1936, c. 830, Title V, 49 Stat. 1965, 27 U.S.C.A. § 201 et seq. (1939).

2. In typical NIRA fashion, the regulation of the industry was accomplished through the establishment of code authorities, separate codes governing the different groups in the industry. A permit system was created and, during the short life of the codes, regulations covering advertising, labeling and fair trade practices were issued.

3. The major amendments of the original statute made by the Act of June 26, 1936 (supra, note 1) consisted of the provisions required to transform the Administration from a division in the Treasury Department with a single person at its helm to an independent agency composed of three members. The amendments are not to be effective, however, until two of the three members have been appointed, and this has not as yet been done.

The failure of the President to exercise his appointive power has resulted in the continuance of a rather anomalous status. While the Administration is nominally a division in the Treasury Department, the only supervision exercised by the Secretary of the Treasury is limited by the Act to the approval of regulations and the compensation of employees. In all other matters, the Administration is, to all practical purposes, an independent agency with one member instead of three, as intended by Congress. It seems unfortunate, in light of the uncertain status of the Administration, that none of its approximately 170 employees are covered by the civil service laws and the Classification Act of 1923.

* This monograph was submitted October, 1939, finally revised January, 1940.

The Statute. The regulatory scheme of the Act is to place the liquor industry entirely under the supervision and control of the Administration. With the exception of brewers, retailers, and state monopolies, all members of the industry must secure permits[4] whose duration is conditioned upon compliance with the provisions of the Act, the twenty-first amendment and all Federal laws relating to alcoholic beverages.[5] The granting of permits[6] and their suspension, revocation and annulment,[7] are among the major duties and powers of the Administration.

There are now outstanding more than 15,000 licenses, most of which are held by wholesalers; several thousand permits have been either revoked, annulled, or voluntarily cancelled. The section of the industry subject to regulation by the Administration produces annually more than $350,000,000 of distilled spirits and wines. Approximately $600,000,000 of products are now stored in bonded warehouses, from which an average of $120,000,000 in tax paid withdrawals are made each year. As the industry continues to grow in size and importance, the licensing activities of the Administration assume increasing significance.

The other functions of the Administration relate to the implementation and enforcement of the provisions of the Act dealing with unfair competition, trade practices, bulk sales, and interlocking directorates. In an attempt to maintain competition in the industry, the Act

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4. Section 3.
5. Section 4 (d), (g).
6. Section 4 (a) - (c). In connection with the granting of permits, the Administrator is authorized to prescribe the manner and form of all applications as well as the form of basic permits.
7. Section 4 (e). Orders of the Administrator denying an application for, or suspending, revoking or annulling a permit, may be appealed to the circuit courts of appeals. Section 4 (h) limits such appeals to matters to which objections were urged before the agency and makes the Administrator's findings of facts conclusive, if supported by substantial evidence.

proscribes certain predatory practices which would tend to result in the control of retail outlets by a few powerful producers or wholesalers of alcoholic beverages.[8] A purchaser of alcoholic beverages may not lawfully be induced to withhold his patronage from others, by any of the following means: Exclusive outlet agreements, "tied houses," commercial bribery, or consignment or conditional sales.[9] With two exceptions, the sole task of the Administration with respect to this phase of the Act is to police it.[10] Among the methods by which a "tied house" can be induced, however, are included the giving of things of value to retailers and the extension of credit for a period greater than the usual credit term. As to the former, the Administrator is given power to prescribe exceptions by regulations.[11] As to the latter, he must ascertain what is the "credit period usual and customary to the industry for the particular class of transactions" and must then incorporate his conclusions in governing regulations.[12]

The Administrator is also empowered to issue regulations relating

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8. The unfair competition and trade practices provisions apply to brewers only if the State into which the malt beverages are brought has enacted similar statutes relating to intrastate transactions.

9. Section 5(a) - (d).

10. There is a certain amount of overlapping here between the functions of the Federal Alcohol Administration and the Federal Trade Commission. Unfair methods of competition and unfair and deceptive acts or practices are unlawful under the Federal Trade Commission Act. 15 U.S.C.A. § 45 (1939). The giving of things of value forbidden by Section 5(b)(3) may also be violative of the Robinson-Patman Act. Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C.A. § 13 (1939).

11. Section 5(b)(3). As the Administration is now constituted, all regulations are required by Section 2 (d) of the Act to be approved by the Secretary of the Treasury. See infra, p. 62-63

12. Section 5 (b)(6).

to the labeling and advertising of alcoholic beverages[13] and the sale of liquor in bulk.[14] Internal revenue officers will not permit alcoholic beverages to be bottled unless the bottler can produce either a certificate of label approval or a certificate of exemption from labeling; a certificate of label approval is also required before alcoholic beverages will be released from customs custody.[15] In addition to promulgating regulations on the subject of labeling, therefore, the Administrator must entertain applications for these certificates.[16] Applications for exemption from the restriction upon interlocking directorates

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13. Section 5 (e), (f). The Federal Trade Commission also has jurisdiction over false advertising by virtue of the recent Wheeler-Lea Amendment of the Federal Trade Commission Act. Act of March 21, 1938, § 4, 52 Stat. 114, 15 U.S.C.A. § 52 (1939). There is likewise a close parallel to the Administration's powers with respect to labeling in the functions of the Food and Drug Administration under the new Food, Drug and Cosmetic Act. Act of June 25, 1938, 52 Stat. 1046, 21 U.S.C.A. § 341 et seq. (1939).

14. Section 6.

15. Section 5(e).

16. Certificates of label approval and of exemption from labeling are issued by the Label Section. The Administrator does not concern himself with applications for these certificates and has delegated authority to affix his signature to certificates to the Deputy Administrator in charge of the Permit Division.

Applications for certificates of label approval, which are required to be made on prescribed forms, are referred to a label examiner for the purpose of ascertaining whether or not the proposed labels comply with the Administration's regulations. For the most part, only routine problems are raised by these applications and, in most instances, the label examiner is able to dispose of them without assistance. In the event that a question of policy or interpretation of the regulations is raised, the Legal Division is asked to give its opinion. Should it be determined that the proposed label is satisfactory, a certificate of label approval is mailed to the applicant immediately. Certificates are not issued if the labels are misleading, imply improper class designations of the product, contain therapeutic claims, or otherwise do not accord with the regulations. In 1938, slightly less than 10% of the applications for certificates of label approval, of which there were more than 100,000, were denied. Fourth Annual Report (1939) 3. (Continued)

may also be made to the Administrator.

16. (Continued). The unsuccessful applicant is advised of the respects in which his proposed label is defective. In almost every case, he does not press his original label, but makes the indicated changes and obtains a certificate for the altered label forthwith. If the applicant remains of the opinion that his original label complies with the regulations, however, he is given the opportunity to confer with the members of the label and legal staffs. Although the rules of practice do not provide for a formal hearing or for argument before the Administrator, it is customary to permit applicants to confer informally with him if they request that privilege.

While this informal procedure provides an ample opportunity for dissatisfied applicants to argue their cases before the head of the agency, it may be desirable to formalize the procedure to the extent of permitting applicants to petition for a rehearing if they continue to question the correctness of the agency's decision. The records of the proceedings on such petitions could then serve as the basis for the review by the district courts in the injunction suits authorized by Section 5 (e), and would prevent the court proceedings from taking on the aspect of a trial de novo.

Applications for certificates of exemption from labeling must be granted if the applicant demonstrates that the products are not to enter into interstate or foreign commerce. The Administration has taken the position that a satisfactory showing is made if the applicant merely states under oath that he does not intend to introduce the beverages into interstate or foreign commerce, and relies upon the deterrent effect of the sanctions attaching to violations as a substitute for an investigation which would involve a complete survey of the applicant's sales policies. The examination of applications for certificates of exemption from labeling would thus be rather perfunctory were it not for the Administration's policy of cooperation with State regulatory bodies. More than half the States have adopted the Administration's labeling regulations as intrastate requirements and, as a result, a product which is technically exempt from the federal provisions may nevertheless, as a practical matter, be subject thereto. In many instances, therefore, the Administration has been in a position to advise an applicant that, while he is entitled to a certificate of exemption, it would be of no utility to him because his label would not satisfy the local requirements. Such intelligence has generally resulted in the withdrawal of the application and the filing of an application for a certificate of label approval.

17. The attempt to prevent monopolistic tendencies in the liquor industry by placing restrictions upon interlocking directorates represents, in large part, an effort to close the barn door after the horse was stolen. Section 8 of the Act exempts from the prohibition, directorates in companies affiliated at the time of its enactment, as well as interlocking directorates then existing. Since the liquor industry had already developed definite oligopolistic aspects in 1935, the statutory prohibition has been nugatory. See Gaguine, The Federal Alcohol Administration (1939) 7 Geo. Wash. L. Rev. 949, 975-7.

In addition to the authority given to the Administrator to prescribe regulations in connection with specific matters, he is empowered to promulgate "such rules and regulations as may be necessary to carry out his powers and duties."[18] He is also authorized to require permittees to file such reports as he deems necessary to carry out his functions.[19]

Sanctions. A violation or threatened violation of any of the provisions of the Act, or the regulations issued thereunder, may be enjoined, and any person engaged in such unlawful conduct is guilty of a misdemeanor punishable by a maximum fine of $1,000.[20] The Administrator is given authority, however, with the approval of the Attorney General, to compromise the liability arising with respect to any offense.[21] A permittee who wilfully engages in illegal activity is subject to the additional liability of suspension or, in the case of a second offense, revocation of his license.

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18. Section 2 (d).
19. Section 2 (h).
20. Section 7. A violation of the bulk sales provisions of Section 6 is punishable by a fine of not more than $5,000 or imprisonment for not more than one year, or both.
21. This provision for compromising a criminal offense is modeled after similar compromise sections in the revenue laws. See, e. g., 19 U.S.C. §§ 1616-1618 (1935), authorizing the Secretary of the Treasury to compromise, remit or mitigate fines, penalties and forfeitures incurred under the customs laws. Since no prison sentence is imposed for violations, there is no real difference between the criminal penalty provided for in the Act and the forfeiture provisions, which contemplate recovery by civil action, found in many statutes. See, e. g., Section 220 (d) of the Communications Act, 47 U.S.C. § 220 (d)(1935).

PART I

ADJUDICATION AND LICENSING

I. Pre-Hearing Procedure

A. Applications for Basic Permits

Applications. A person desiring to obtain a basic permit to engage in any phase of the liquor industry covered by the Act is required to file three copies of his verified application at the offices of the Administration in Washington.[22] The form of applications has been prescribed, and strict adherence is demanded. The information which must be provided depends upon the type of permit desired; an applicant for a rectifier's permit, for example, is required to set forth complete data relative to the existing or proposed plant to be utilized in the business, information which an applicant for a wholesaler's permit is not required to submit.

Investigations. Applications for basic permits are usually referred to the Enforcement Division for investigation, except in the case of beer or wine wholesalers' permits, which are ordinarily granted without investigation if no ground for denial appears on the face of the application. A copy of the application is sent to the member of the Administration's field staff of 25 investigators who is geographically in the best position to make the investigation. The careful check that is made of all the assertions in the application generally necessitates the interrogation of the applicant and the inspection of his proposed place of business. In order to ascertain whether the applicant has been convicted of a crime of the type that would disqualify him from receiving a permit, a thorough study is made of the records of the nearest local office of the Alcohol Tax Unit of the Treasury Department, the federal and state courts in tho...

22. Regulations No. 1 (1935) Art. II, Sec. 2.

area in which the applicant resides, and any other possible sources of information relative to prior arrests and convictions. Any persons whose names were given as references are questioned and the applicant's credit standing is investigated. In the case of corporate applicants, the same type of field investigation is made of each of its officers, directors, and principal stockholders.

A complete report of the investigation - containing no recommendations, however - is sent to Washington, where it is referred to the Permit Division. The investigator is required to incorporate in his report all information obtained by him concerning the applicant's criminal record, business experience, and financial standing, so that the Permit Division may have all the relevant data and thus be in a position to make a meaningful recommendation to the Administrator.

Disposition of Applications; Grant of Permits Without Hearing. The application and the investigator's report are reviewed by the Permit Division for the purpose of ascertaining whether any grounds exist for the denial of the application. Section 4 (a)(2) of the Act requires the Administrator to grant a permit unless (A) the applicant has been convicted of a felony under Federal or State law within five years, or of a misdemeanor under a Federal liquor law within three years of the date of application; (B) the applicant is unlikely by reason of his business experience, financial standing, or trade connections, to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) the proposed operations are in violation of the laws of the State in which the applicant intends to do business. If there is nothing in the application or in the investigator's report that indicates the possibility of the existence of

any of these grounds, the Permit Division recommends to the Administrator that the permit be issued.

If the application is incomplete in any respect, or if the investigator's report indicates that further information or explanation on some point should be obtained, the Permit Division attempts to correct the defects by correspondence with the applicant or his attorney. The applicant is requested to supply the information under oath and is advised that his response will be made a part of his application. Amendments and additions to an application may be made at any time prior to its disposition, and the Administration must be notified immediately of any change in ownership, control or management of the applicant.[23]

If, after study of all the documents, the Permit Division has the slightest doubt whether an application should be granted, it refers the matter by memorandum to the Legal Division for its study and recommendation. These matters are normally sent to the Trial Section where the questions raised by the Permit Division, and any other problems arising out of the application, are considered. The attorney to whom the case is assigned may engage in the same type of correspondence with the applicant as does the Permit Division and, although he makes no effort to discourage the applicant, his inquiries sometimes induce the withdrawal of the application. In one case, for example, a partnership had applied for a permit and, in response to the item in the application form relating to convictions of crimes, had stated that neither partner had been, within five years, convicted of a felony under any State or Federal liquor law. One of the partners had

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23. Ibid.

in fact been found guilty of receiving stolen goods and, when the Administration requested that a statement be made as to convictions under any State or Federal felony statute, the application was withdrawn and the partner with the untarnished record filed a new application as an individual.

In the event that the Legal Division determines, upon the completion of its study of the application, that the permit should be issued, it so advises the Permit Division by memorandum, and the latter then prepares its report for the Administrator recommending the grant of the application. The Administrator, it is said, studies every application with minute care and, if necessary, consults with the members of the staff who are familiar with the matter in order to clarify doubtful points. Although he has thus thoroughly reviewed all recommendations for grants without hearing, the Administrator has almost invariably concurred therein.[24]

If the attorney in charge of the case is of the opinion that adequate grounds for denial are present, or that some aspects of the application should be further investigated at a hearing, he incorporates his recommendation to that effect in a memorandum to which he attaches a draft of a notice of contemplated denial. The matter is carefully reviewed by the Chief of the Trial Section and, if a difficult legal problem or one of novel impression is involved, by the General Counsel. The memorandum

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24. During the year 1937, action was taken on 3,339 applications, of which 2,979 were granted (almost all without a hearing), 33 denied, and 327 withdrawn. Third Annual Report (1938) 4. In 1938, 2,407 applications were disposed of, 2,220 permits were issued, 8 applications denied and 179 withdrawn. Fourth Annual Report (1939) 4.

together with any other relevant information, such as the application and the investigator's report, is then sent to the Administrator for his perusal and action. In most cases, if the staff has recommended that a notice of contemplated denial be issued, the Administrator, after his usual thorough study of the matter, adopts the staff's opinion as his own and signs the notice.[25] Occasionally, however, and particularly where a novel question of policy is involved, the Administrator may disagree with the staff and order that the permit issue without a hearing.

Notices of Contemplated Denial. The notice of contemplated denial, which must be served upon the applicant prior to denial pursuant to the requirements of Section 4 (b) of the Act,[26] sets forth the grounds upon which it is anticipated the application will be denied, and apprises the applicant that he will be given an opportunity to be heard if he requests a hearing within 15 days after the date of the notice. Accompanying the notice is a form letter over the signature of the General Counsel, and a copy of the Administration's rules of practice and procedure. The letter draws the applicant's attention to the provision of the rules which requires that a hearing be requested.[27]

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25. After the first rush of applications, received immediately after the creation of the Administration, were disposed of, very few applications have been designated for hearing. In the year 1937, only 26 notices of contemplated denial were issued, and in 1938 the total was 31. Up to October 20, 1939, 21 notices had been served.

26. See also Regulations No. 1 (1935) Art. II, Sec. 7 (a). Section 4 (f) of the Act requires the Administration to serve any orders with respect to the denial of applications or the suspension, revocation or annulment of permits either personally or by registered mail. To the same effect is Regulations No. 1 (1935) Article V, Sec. 1.

27. Id., Art. II, Sec. 7 (a).

The form which the notice takes depends upon the extent of the Administration's knowledge of the facts. If, as a result of its investigation, the Administration is in possession of definite information upon which denial may be predicated, the facts are fully set forth in the notice. Occasionally however, there is only a suspicion as to the true factual situation and under such circumstances the notice contains nothing more than a mere paraphrase of one or more of the statutory grounds for denial. There appears to be no justification for the Administration's failure, under such circumstances, to set forth in the notice of contemplated denial at least the tentative suspicions which are to be explored at the hearing. It is said that the reason for couching the notice in general terms, is the hesitancy of the Administration to make a formal imputation of a shady transaction. Since the Administration does not intend to relax its customary energetic conduct of the hearing, however, there is no doubt that the imputation will be made at that time. In that event, the main function of the notice - to apprise the parties of the issues - is not fulfilled unless it indicates the Administration's position with greater precision than it now does.

The same criticism may be made of the Administration's use of the general statutory language as an additional ground for denial in cases in which denial is predicated upon a specific ground, with an adequate factual basis which is fully set forth in the notice. If the purpose of the general allegation is to furnish a catch-all, in the event that additional facts are uncovered which would support a denial, it is a purpose which fails to take cognizance of the practical situation. Although the rules of practice do not provide for amendments to a notice of contemplated denial, there is no basis on which an applicant could object

to such amendments, if he was given ample notice thereof or if he made no objection to the introduction of the testimony to which the pleadings are intended to be conformed.

Bills of Particulars. Because of the generality of many of the notices of contemplated denial, the Administration frequently receives requests for a bill of particulars. In addition to assisting applicants to prepare for trial, therefore, a more precise drafting of notices is likely to diminish the number of such requests. No procedure is provided by the rules of practice for the time, form, or manner of making demands for bills of particulars. As a rule, requests for particulars are made at the same time that the applicant files his request for hearing. The Administration generally grants these requests and, on occasion, even permits the applicant's attorney to make an examination of some of its files. Demands for bills of particulars have occasionally been denied where the applicant is given ample notice and the request is one which seeks the disclosure of evidence rather than a more specific statement of the issues.

In the interest of persons who have had no previous dealings with the agency, it may be suggested that the Administration should embody in its rules of practice a description of its now unwritten procedure for obtaining bills of particulars.

Requests for Hearings. The sole function performed by an applicant's answer to the notice of contemplated denial is to apprise the Administration of his intention to avail himself of the opportunity to be heard. The only requirement to which the applicant must conform, therefore, is that his request be made in writing. Applications for hearing thus take the form of letters, telegrams and, occasionally,

formal petitions.

Defaults and Withdrawals. In many cases, the applicant, upon receipt of the notice of contemplated denial, either because he perceives the futility of availing himself of the opportunity to be heard or because he has lost interest in the matter, fails to request a hearing. Since the statute merely requires that an applicant for a permit be given only an opportunity to be heard before his application is denied, a provision which is reiterated in the Administration's rules of practice, the failure to request a hearing is followed by the entry of a final order denying the application.[28]

Many applications are withdrawn or amended after receipt of notice of contemplated denial. Where the applicant is a corporation or partnership, for example, the notice serves the purpose of apprising the interested parties of defects in their personnel which, if remedied, and the application amended to reflect the change, will remove the Administration's objections to the granting of the permit.

B. Annulment, Suspension and Revocation of Permits.

Introduction. Section 4 (e) of the Act authorizes the Administrator, after due notice and opportunity for a hearing, (1) to revoke a permit or suspend it for such period as he deems appropriate, if the

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28. Id, Art. II, Sec. 7 (b). The number of defaults and withdrawals in application cases is rather high, as may be observed from the following statistics:

Year	Notices of Contemplated Denial	Defaults	Applications Withdrawn
1937	26	8	11
1938	31	10	7
1939	21	4	5

The statistics for 1939 cover the period from January 1 to October 20. Four of the notices of contemplated denial were only recently issued and the period for answer has not yet run.

permittee has wilfully violated any of the conditions of the permit;[29] (2) to revoke a permit if its holder has not engaged in business for two years; and (3) to annul a permit if it was procured through fraud, misrepresentation or concealment of material fact. The Administration is dependent, to a large extent, upon extra-agency assistance in the ascertainment of violations of the Act, of the rules and regulations promulgated thereunder, the twenty-first amendment and other federal liquor laws, all of which are breaches of the conditions under which basic permits are issued. Most annulment proceedings arise from investigations conducted in connection with alleged violations, and revocation proceedings based on non-use are uniformly instituted as a result of certain normal activities of the Administration's staff which are more fully described below.

Complaints. The Administration receives many communications, both written and oral, complaining of the activities of permittees. The bulk of the complaints, generally relating to alleged violations of the trade practices provisions of the Act, are made by competitors or by representative trade associations such as the Distilled Spirits Institute, the League of Distilled Spirits Rectifiers and the Wine Institute; sometimes the complainant is anonymous. These communications are kept in the strictest of confidence and not even the investigators are advised of the identity of the informants. Most complaints received in this fashion have been found to be meritorious, a situation which indicates that the industry is thus far doing an effective job of self-policing.

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29. A first violation subjects the permittee to suspension only.

Complaints are also received from state officials. These occasionally deal with violations of the twenty-first amendment, but the vast majority are concerned with unlawful practices occurring in interstate commerce, matters over which the local regulatory bodies have no jurisdiction, but which were referred to them in the first instance.

A large number of violations of labeling requirements are called to the Administration's attention by the Alcohol Tax Unit of the Treasury Department[30] when discovered by the storekeeper gaugers stationed by the Alcohol Tax Unit on the premises of distilled spirits and fortified wine plants. In the course of their examination of the contents of bottles for the purpose of administering the alcohol tax laws, the gaugers are sometimes able to detect misbranding and other irregularities in labeling. In order to increase the efficiency of the gaugers in this phase of their duties and to decrease the number of violations which escape their scrutiny, the Enforcement Division has adopted the practice of meeting with the gaugers for the purpose of educating them in the intricacies of the Administration's labeling regulations. While these conferences have been of some value, there are still many violations which elude the gaugers; these, as well as the large volume of offenses by permittees whose activities are not intimately supervised by the Alcohol Tax Unit, must be brought to light by other means.

Investigations. The type of investigation pursued by the Administration depends upon the nature of the alleged violation. The

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30. Evidence of the close working agreement between the Administration and the Alcohol Tax Unit will be apparent throughout the balance of this study. In addition to the matters hereinafter referred to, it should be noted that the major sources of information concerning violations of the permit requirement of Section 3 of the Act are the lists of persons applying to the Alcohol Tax Unit for liquor dealers' stamps. If a person is going to sell liquor, it is probable that he requires a permit, and if the Administration's files fail to reveal his name among its permittees, an investigation is instituted.

Enforcement Division has been divided into several sections, each of which is expert in a particular field of violation, the investigatory process differing in each. Violations of the trade practices provisions, for example, require an extensive field investigation; the discovery of violations of false advertising regulations, on the other hand, can generally be done without leaving the offices of the Administration.

1. Labeling Violations. If the Administration has received a communication complaining of a departure from the labeling regulations, the matter is generally assigned to one of the regular staff of field investigators. Occasionally, if the case is important enough to warrant it, one of the specialists in the Washington office is designated to make the field investigation. To ascertain whether there has been a violation of the labeling regulations, the investigator generally finds it necessary to undertake a study of the records of the permittee, and occasionally requires access to the plant in order to make an inspection of the manufacturing and bottling process. The Administration has, for the most part, experienced no difficulty in making these investigations. Duplicate copies of the permittee's records are generally available at the district office of the Alcohol Tax Unit, and even if they cannot be obtained conveniently in that manner, the permittees have ordinarily opened their books and given access to their plants without being compelled so to do. In a few cases, however, it has been necessary to subpoena the books and records of permittees who have refused to cooperate voluntarily with the Administration's investigator.

It is unnecessary, as a rule, for the Administration to have a chemical analysis made of the beverages suspected of being improperly labeled. On those rare occasions where the investigator is unable to ascertain the precise contents of the bottle, however, a sample is sent

for analysis to the chemists employed by the Alcohol Tax Unit. These experts, as well as the storekeeper gaugers, are always available as witnesses if the need for their testimony arises.

When the investigator has determined that there has been a violation of the labeling regulations, his next step is to obtain evidence of an interstate shipment of the improperly labeled products. After he has traced the beverages across the state line and has obtained a sample of the product from a retailer or wholesaler to whom the permittee has made sales, he incorporates the complete results of his investigation, together with any documents or other evidence necessary to establish the offense, in a report which he sends to the Enforcement Division.

2. Trade Practices Violations. Most of the investigations undertaken by the Administration are directed toward the discovery of violations of the trade practices provisions of the Act. It is extremely difficult to establish a violation of any of these provisions since, in addition to obtaining evidence of an exclusive outlet agreement or the use of a "tied house" relationship, commercial bribery or consignment sales to induce purchases of products from the permittee, it is necessary to secure proof of the two other elements of the offense. Under the statute, it must be shown that the practice either induced a purchase or had the effect of substantially restraining transactions in interstate commerce, and also that the products were purchased to the exclusion, in whole or in part, of beverages sold by other persons. Because of the difficulty of obtaining evidence on the question of inducement--the information is, for the most part, in the possession of retailers who are unwilling to risk the displeasure of important members of the industry--the

Administration would probably never have a complete case under Section 5 if it had not adopted a short-cut policy: Having established, for example, that a distiller supplied a retailer with equipment that was worth $100, the Administration infers, first, that the gift was the inducement for the sale, and, second, that the sale resulted in the exclusion of other distillers. The soundness of these inferences has never been judicially tested because "the industry appears to prefer to compromise the liability incurred and to cooperate with the Administration in its efforts to enforce the provisions, rather than litigate the question."[31] Although the Administration obviously entertains grave doubts as to the propriety of these evidential hypotheses,[32] it nevertheless continues to act on the basis of evidence which necessitates the continued use of the questionable inferences.

3. Twenty-first Amendment Violations. The investigation of complaints alleging violations of the twenty-first amendment presents little difficulty, but it is almost impossible to uncover a clear offense. The amendment prohibits only the shipment of alcoholic beverages into a dry or monopoly state, a provision which is readily avoided by over-the-counter sales to persons who intend to bootleg the products in the theoretically protected states. A careful examination of the affairs of a permittee known to be violating the spirit, if not the letter, of the amendment, does occasionally reveal another basis for proceeding

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31. Gaguine, The Federal Alcohol Administration (1939) 7 Geo. Wash. L. Rev. 949, 969.

32. In both his third and fourth annual reports to Congress, the Administrator has recommended the passage of amendments categorically forbidding the overt acts, amendments which would make it unnecessary to establish the probanda which, in effect, are now disregarded by the Administration.

against him.

4. False Advertising Violations. Investigations of violations of the false advertising provisions of the Act are, for the most part, routine. The Enforcement Division employs five specialists who examine advertisements of liquor firms in all of the major periodicals and newspapers carrying liquor advertising. Spot checks of advertising in smaller newspapers are made with the assistance of the Press Intelligence Division of the Office of Government Reports. In addition, reports of improper advertising in media of a more local nature are submitted by competitors, trade associations, and by members of the Administration's field staff. The Enforcement Division has also assigned one man to make a survey of billboard and point-of-sale advertising. Examinations are made in these ways of a total of more than 75,000 advertisements annually.

Most of the violations of the advertising provisions have been minor in nature and the practice of the Administration has been merely to call the irregularities to the attention of the responsible advertisers, together with a suggestion that the necessary alterations be made. In virtually every instance in which the Administration has undertaken correspondence of this type, the advertising has been discontinued almost immediately.

5. Proposed Declaratory Rulings. Many potential violations of the advertising provisions have been avoided through the use of preventive enforcement measures. The Administration has indicated to the trade that it is willing to give what are in effect "advance opinions" as to the propriety of proposed advertising. The enforcement and legal staffs have held numerous conferences and engaged in substantial correspondence with permittees or their attorneys concerning proposed advertisements and, as

a result of such discussion and correspondence, have succeeded in avoiding many objectionable advertising campaigns. The approval given by the staff to proposed advertising is said to be non-official, but, as a practical matter, it is hardly conceivable that any action would be taken against a person who used an advertisement previously approved by the staff.

One finds, in the circumstances connected with the preliminary approval or disapproval of proposed advertising matter, an almost perfect opportunity for the development of declaratory rulings, the administrative counterpart of declaratory judgments. The facts to which a declaratory ruling might relate are certain and fixed, for they comprise only the words, illustration, and arrangement of proposed advertising copy. Hence, there would be no danger that a ruling declaratory of the propriety or impropriety of the proposed matter would be distorted or misapplied to circumstances to which it was not intended to extend. The need for ruling in advance of action is, moreover, considerable. A permittee, though acting in good faith, may, by launching upon a national advertising campaign, find himself embroiled at a later date with authorities whose application of regulations does not accord with the permittee's expectations. It is not suggested that he should in each instance be required to submit his proposed advertising material for the prior approval of the Administration; so to require would be to place unnecessary burdens upon both the permittees and the Administration in connection with innumerable advertisements of unquestionable propriety. It is proposed only that the permittee should be given an opportunity to secure an advance and binding determination in those instances in which his own doubts disincline him to risk using an advertisement which might later be discovered to be

violative of the Administration's regulations.

The development of the declaratory ruling device in this context would require two alterations in the Administration's present practice. First, the Administration would have to substitute, for its present unofficial endorsement of submitted advertising material, an official approval which would be as binding upon it as any other adjudication it might make. Second, in the event that approval of submitted advertising material was withheld, a method would have to be developed to allow the permittee to take a formal appeal to the Administrator and, if dissatisfied with the latter's decision, to the courts, just as the permittee may do now in the event that there is a disapproval of his advertisement after it has been used. Such a possibility of appeal from an adverse administrative determination is necessary if the permittee is not to be faced with the bleak necessity of either abandoning his intended advertisement or of flatly disregarding the Administration's advance opinion, with the knowledge that upon his doing so he may be compelled to resist suspension proceedings. Presented with such a choice, the permittee must almost invariably select the former alternative. The declaratory judgment procedure, now familiar to the courts, suggests another and a better way of resolving doubts without exposure to danger or to the necessity of surrendering an arguably sound position.

6. Inactive Permittees. Revocation proceedings based upon a two-year non-user of the permit privileges are generally instituted as a result of a systematized search by the Administration's staff for inactive permittees. The continued failure of permittees to file the monthly reports of operation required by the Administrator pursuant to Section 2 (h)

of the Act, is the source of most revocation cases. If requests to file the statistical information are unanswered, or if the permittee indicates in his report that he has not been operating, the attempt is made to ascertain how long the inactivity has been going on. The procedure followed varies slightly depending upon the type of business which is authorized by the permit. If the production of wine is contemplated by the permit, for example, inquiry is made of the Alcohol Tax Unit as to whether the holder of the permit has posted the winemaker's notice and bond required by the tax laws. If a negative response is received, the Permit Division customarily writes to the permittee requesting him to surrender his permit voluntarily, if he has no intention of engaging in business. For the most part, these requests have resulted in the voluntary surrender and cancellation of the permit. In many cases, however, the letters are either not received, or, if received, are not answered. Periodic requests of this type are made until the Permit Division is of the opinion that the two-year period of inactivity has run. At that time a final request is made that the permit be voluntarily surrendered and the permittee warned that if he does not accede thereto, it will be essential for the Administration to resort to revocation proceedings. If this final attempt to obtain the surrender of the permit is unsuccessful, a recommendation is made to the Legal Division that revocation proceedings be instituted.

"Settlement" of Cases. The results of the investigation, other than in non-user matters, are studied by a member of the enforcement staff who is a specialist in the particular field of violation. His analysis of the case, together with his recommendations thereon, are

incorporated in a memorandum which is sent to the head of the Enforcement Division. If there does not appear to be any hope of establishing a violation, the case is closed. If the evidence appears to be sufficient to establish a violation, however, the head of the Enforcement Division must determine whether the offense is of a type that would justify the institution of suspension proceedings, or one which should be disposed of by way of compromise. The Administrator is given authority by Section 7 of the Act to compromise the liability arising with respect to any offense. If the violation uncovered by the investigation is a technical, but not a substantial, departure from the statute, or the rules and regulations promulgated thereunder, the policy of the Administration has been to accept an offer in compromise rather than to subject the permittee to the serious penalty of suspension. A similar attitude has been adopted toward violations which are not wilful and therefore unable to support an order of suspension. If a wholesaler had given a retailer a ten-dollar piece of equipment, for example, a technical violation of the "tied house" provision of Section 5 (b) has been committed. The offense is so picayune, however, that it would be unreasonable to suspend the offender's permit on that ground. An instance of a non-wilful violation is the situation in which a salesman employed by a large distilling corporation made gifts to retailers in the face of specific instructions to the contrary from his superiors.

If the policy of the Administration dictates that a violation should be compromised, the head of the Enforcement Division writes to the permittee apprising him of the facts uncovered by the investigation and of the penalties to which the permittee is subject. The letter then states that the violation is compromisable and refers to the privilege

of making an offer in compromise. Two copies of the form prescribed by the Administration for such offers are enclosed. Only in rare instances have permittees failed to avail themselves of this opportunity of settling the case. On some occasions the amount offered in compromise has been regarded as inadequate, in which case the offer has been returned together with a letter indicating what sum would be acceptable. The amount which is taken in compromise depends upon the seriousness of the offense, the frequency with which the permittee has been guilty of transgressions, and the extent to which similar violations have been committed by other industry members. In no event may the offer exceed $500 for each violation and, as a rule, averages about $25.

If the offer is acceptable to the Enforcement Division, receipt thereof is acknowledged and the offerer notified that the matter will be considered by the Administration and acted upon in due course. The offer, together with a memorandum summarizing the case and recommending its settlement, is then sent to the Legal Division, where it is considered by the Trial Section. Only in rare instances has the Legal Division had any cause to disagree with the Enforcement Division's recommendation. Occasionally apparent inconsistencies in the sizes of offers in different cases are called to the latter's attention, but there usually are variations in the facts which justify the acceptance of different amounts. It is possible that the Legal Division may be of the opinion that suspension proceedings should be instituted, in which case the matter will be discussed fully with the enforcement staff before recommending the rejection of the offer. For the most part, however, the Legal Division has acquiesced in the recommendations of the Enforcement

Division and prepared a letter to the Attorney General recommending that he approve the acceptance of the offer in compromise. This letter is signed by the Administrator, who almost never has any reason to discuss the matter with the staff.[33]

It is impossible to determine whether the Administration's exercise of its authority to settle cases has been above reproach. The potentiality of abuse is always present as long as permittees dread the mere possibility that suspension proceedings may be instituted. Such fear provides a potent inducement to settle cases, particularly if the compromise figure is so small that it occasions no greater expense than would be involved in the defense of suspension proceedings. The temptation to solicit settlements even of cases where the Administration's case is weak must be almost irresistible under such psychological conditions. The Administration is under a heavy burden of responsibility to exercise the greatest care in suggesting offers in compromise, taking such action only when a clear case of violation has been established.

The approval of offers of compromise by the Attorney General, which is required by the statute, is an excellent example of a superfluous administrative act. After a case has been carefully studied by the Administration, as indicated above, a period of approximately six weeks

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33. Although the Administration accepted 1,440 offers in compromise in 1937, and 1,094 in 1938, not more than ten per cent of the offers were related to violations of the Act other than failures to obtain a permit as required by Section 3. The Administration has, as a matter of general policy, accepted a nominal offer in compromise, usually $10.00, in settlement of charges that an individual has operated without a permit. The Administrator has, therefore, confined his own thorough study to the approximately 300 cases which involved permittees charged with violating the statute or regulations. The more difficult of the latter group of cases, moreover, have ordinarily been discussed with the Administrator prior to soliciting the offer in compromise; as a result, few problems upon which he has not already expressed his opinion are presented to him at this stage of the proceedings.

must still elapse before the compromise is finally approved by the Department of Justice. In the Department of Justice, the recommendation of the Administration is first considered by an attorney in the Bond and Spirits Division. If he is satisfied that the recommendation should be approved, the papers are transmitted by him to the Assistant Solicitor General, whose formal endorsement constitutes the act of the Attorney General called for by the statute. In only an inconsiderable number of instances in the history of the Administration, has it been necessary for its representatives even so much as to confer with the attorney at the Department of Justice concerning the propriety of accepting a proffered settlement. And out of more than 3,000 cases in which the Administration has recommended compromise, there have been only three or four in which the Department of Justice has indicated its intention to withhold approval. In these cases, the Department of Justice attorney took the position that the offense sought to be compromised was of too serious a character to permit so easy an expiation of the permittee's wrong-doing; in his opinion, the Administration should instead have initiated proceedings of a criminal or of a suspending character. But, even in these rare instances, the Department of Justice has, upon further discussion, receded from its position and approved the offer. In no instance, moreover, has the Department of Justice interposed an objection upon the ground that the solicitation of a compromise was an administrative oppression of a possibly guiltless citizen. It is clear, then, that the chief, if not the sole, effect of the present participation of the Attorney General in the compromise procedure has been to delay final decision for a period of weeks. At its

best this delay occasions uncertainty and concern to the holder of a permit, whose position remains doubtful until there has been final action upon his offer of compromise. Legislation should be recommended to eliminate this unnecessary and possibly damaging step in the administrative process.

Not all violations result in either the acceptance of an offer in compromise or the institution of suspension proceedings. In many cases, the Administration does not have sufficient evidence to establish an offense, but all the available information indicates that there has been some unlawful conduct. Under these circumstances, an attempt is made to induce the violator to discontinue his activities by discussing the matter with him. This is particularly true of practices generally indulged in by the leading permittees. When one permittee in the liquor industry institutes a policy of unfair practices, his competitors are likely to follow suit without delay. By the time the Administration uncovers the violations, therefore, the practices are generally prevalent throughout the industry. Each competitor, upon being called into conference, almost invariably declares his willingness to discontinue his activities if the other offenders will do likewise. If the Administration is thus successful in securing an abatement of the practices, it has ordinarily been content with that result and has neither instituted suspension proceedings nor solicited offers in compromise.

Orders Instituting Proceedings. The recommendations of the staff that proceedings be instituted are referred for review to an attorney in the Trial Section. If he is in disagreement with the opinions contained in the staff memorandum, either because the investigation appears to be

incomplete or because the evidence is apparently insufficient as a matter of law or Administration policy to warrant the institution of proceedings, the matter is discussed in detail with the responsible staff member. Should the attorney prevail, the case is dropped as being without merit, or is marked for further investigation if there appears to be some likelihood of obtaining additional information; if there is no question as to the existence of a violation, but it is of a type which does not justify the institution of suspension proceedings, an offer in compromise is solicited. On rare occasions, particularly where questions of policy are involved, the inability of the staff to agree necessitates the presentation of the matter to the Administrator for his disposition.

If the trial attorney concurs in the recommendation that proceedings for the annulment, revocation or suspension of the permit should be brought, an order instituting proceedings is prepared for the signature of the Administrator. The memorandum of the attorney which accompanies the order, together with other pertinent information, is carefully studied by the Chief of the Trial Section, and sometimes by the General Counsel, before being referred to the Administrator. As is his wont, the latter reads all the documentary material before affixing his signature, but he has never been known to disagree with the conclusion of the staff that the proceedings should be inaugurated.[34]

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34. The administration has instituted a surprisingly sparse number of proceedings. Other than uncontested cases looking toward the revocation of permits for non-user (infra note 38), there have been fewer than 200 proceedings brought. Annulment cases have been exceedingly rare, totaling only 7 in the entire history of the Administration, and suspension cases have tapered off from a total of 93 in 1937, to 31 in 1938, and to only 22 in the first ten months of 1939.

Orders instituting proceedings, which are served in the same manner as notices of contemplated denial,[35] are not always samples of well-prepared pleadings. The orders used in revocation proceedings are stereotyped and beyond criticism. But the same is not true of the orders in suspension and annulment cases. Many of them are so general in scope that the respondents are neither apprised of the issues nor able to prepare themselves for trial. While there has been some improvement recently in the quality of the orders instituting proceedings, some cases are still inaugurated by pleadings which, with greater care in drafting, could be vastly improved. One immediate advantage to be derived by the Administration from the elimination of poorly-prepared orders will indubitably be the reduction in the number of requests for bills of particulars, a rather common practice under the present system.

Press Releases. At the time the order instituting proceedings is served, the Administration mails to all members of the industry and issues to newspapers of general circulation and to trade journals, a press release which is intended to apprise the industry and the public of the pendency of the proceedings. The release contains a brief but accurate account of the case, and special care is taken to indicate that the permittee is only suspected of having violated the Act and that he has been given the opportunity to be heard in defense against the charges.

The publication of the press release is perhaps the most effective sanction which the Administration possesses. The consequences of such publication upon a permittee's activities is generally thought to be

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35. Supra, p. 11

at least as disastrous as the entry of an order suspending the permittee. For one thing, competitors have been able to convince their customers, by distributing copies of the release or by oral republication of its contents, not to deal with persons who are sufficiently reprehensible to be respondents in suspension proceedings. Another direct effect of the press release is to place the permittee upon the black-list which some monopoly states have created for industry members who are in difficulty with the Administration. These are immediate results flowing from the mere institution of proceedings and necessarily harm both innocent permittees as well as the guilty ones.

Because the publication of a press release has an immediate detrimental effect upon the suspected permittee, there has been an increasing tendency on the part of industry members to settle cases prior to the institution of proceedings. Whether they are right or wrong on the merits of the case, they must inevitably lose something, other than the mere cost of defending a law-suit, by litigating the issues. While the effect of the use of the press release is thus to discourage the litigation of possibly meritorious cases, there is something to be said in favor of the practice.

There can be little doubt that fear of the press release has occasioned an extraordinary degree of compliance with the Act. The effectiveness of publicity has generally been recognized as providing an additional sanction to regulatory agencies and, as a result, the press release is now a common phenomenon. The universality of the press release, however, does not ipso facto justify its use by administrative agencies generally or by any particular agency. That the effective enforcement of the Pure Food and Drug Act requires the use of press releases, does not necessarily

establish the Administration's need for the same device. The problem is inevitably one involving a conflict of imponderables and may not be resolved by a priori reasoning.

In the case of the Administration, it is arguable that the additional deterrent effect of the publicity sanction does not warrant the sacrifice of meritorious cases. The sanctions provided by the statute, particularly the power to suspend the permit, should, if utilized, provide sufficient discouragement to the potential law-breaker. Nor is there need, in the usual case, for the taking of rapid action in order to safeguard the public health or to prevent gross deception of consumers. In the absence of these considerations, therefore, no real necessity for continuing the indiscriminate use of the press release appears to exist.

Answers. Respondents are required to file their requests for hearing, together with an answer to the charges against them, within 15 days after receiving the order instituting proceedings. The rules of practice require the answer to "admit, deny, or explain in detail each ground specified in the Administrator's order."[36] Any allegations which are not denied or explained are deemed to be admitted, and the hearing is limited to the issues framed by the pleadings. Answers received by the Administration have, for the most part, fulfilled their function as a device for narrowing the issues. Only in a handful of cases have the pleadings of respondents been of no utility in this respect and these have usually been matters in which the generality of the orders instituting proceedings have made it extremely difficult to submit precise answers.

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36. Regulations No. 1 (1935) Art. III, Sec. 3.

In many suspension cases, the respondents have indicated their willingness to eliminate the hearing and to proceed immediately to oral argument before the Administrator. The practice in these situations is to stipulate all the facts and to argue any questions of law or, as more usually is the case, to proffer mitigating factors which would support either a compromise settlement or a small period of suspension.[37]

Defaults. In occasional annulment and suspension cases, and in all revocation proceedings in which the permittee does not surrender his permit for cancellation, the respondent, generally because he is no longer engaged in the business, fails to request a hearing within the designated 15-day period. Although the statute provides that a permittee is entitled only to an opportunity to be heard before his permit is suspended, annulled or revoked, and the rules of practice reiterate this provision, the Administration has adopted the policy of designating every default case for hearing.[38]

At the hearing, the Administration presents its entire case, including an elaborate proof of the giving of an opportunity to be heard. All available documentary and testimonial evidence, such as letters from

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37. In 1938 stipulations were entered into in 17 of the 31 suspension proceedings instituted. In all but two of these cases, in which offers in compromise were accepted, orders of suspension were entered. In 1939, the facts were stipulated in 11 of the 19 cases which have been finally determined. Ten of the eleven stipulated proceedings resulted in orders of suspension, and one in the acceptance of an offer in compromise.

38. In 1938, the first year in which revocation proceedings were available to the Administration, 183 cases were instituted. 99 permits were surrendered for cancellation after receipt of the order instituting proceedings and the remaining 84 cases were designated for hearing upon the failure of the permittees to file answers. Of the 48 cases which have been finally disposed of in 1939 (13 more are pending), 38 were designated for hearing after default. It is anticipated that the number of revocation proceedings which will be brought in the next year or two will be substantially greater because the largest group of permittees, the wholesalers, are now being surveyed for non-user cases.

the Alcohol Tax Unit and field investigators' reports, are incorporated in the record. The hearing officer prepares his customary report, a copy of which is purportedly served on the permittee[39] and the usual post-hearing procedure culminating in the order of the Administrator is followed.

The reasons assigned by the Administration for indulging in this patently superfluous gesture are the following: (1) Since the statute requires that the Administrator make findings of facts before he takes action against a basic permit, it is implicit in this requirement that a hearing be held and a record made, on the basis of which such findings may properly be made. (2) If no hearing is had and an appeal is taken from the Administrator's order, how can his action be supported in the absence of a record? (3) The determinations of issues of fact is one which should be made by a person who is not in the position of a "prosecutor", but rather by an independent hearing officer whose viewpoint is detached and who is not afflicted with a prosecutor complex.

As to the first point, it should be noted that all the Act requires is that the applicant be given an opportunity to be heard and that, after such opportunity is afforded, the Administrator make findings supporting his order. There is nothing inconsistent with the statutory mandate in the taking of action on the basis of information which has not been incorporated in a formal record, where the permittee has not re-

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39. The practice has been to send a copy of the report by registered mail to the permittee's last known address, even if frequent previous attempts to notify him in that manner have failed. The Administration has even gone so far as to mail the report to a permittee who, it knows, is dead.

quested a hearing. The contents of the record are mere transpositions from the Administration's files, so that the hearing serves no utility other than to place the pertinent information between two blue covers, a procedure which involves an unnecessary expenditure of staff time and effort.

As to the argument that a record is necessary in order to support the Administrator's order on appeal, there are several points worth noting. In the first place, the likelihood of an appeal is extremely remote. In no case in which action has been taken after default has the permittee even applied for the reopening of the proceedings, a remedy which the Administration would make available to him. Even should an appeal be taken directly, however, there is no need to be concerned about the absence of a record. It is well established that a person who has not exhausted his administrative remedies has no standing in an appellate tribunal, a doctrine which certainly applies to an individual who has not availed himself of his opportunity to be heard. Furthermore, Section 4(h) of the Act limits review on appeal to those matters to which objections were urged before the Administrator. It would seem, therefore, that proof of the satisfaction of the statutory requirement that an opportunity to be heard be provided might be presented to the court by the Administrator either in his answer to the appellant's petition or in papers supporting a motion to dismiss the appeal.

The final argument in support of the Administration's practice in default cases, seems to be equally unconvincing. Even if it be assumed that the independent judgment of an insulated hearing officer is generally desirable in contested proceedings, it is not needed in a case in which the interested parties have indicated no inclination to be heard. Even if the Administration was in error in its interpretation of the facts when the proceeding was instituted, there is no reason to be concerned about arriving at a contrary conclusion if the permittee himself indicates no desire to avoid the imposition of a sanction. In any event, the possibility that the issues will be determined in favor of the permittee is negligible; in the absence of any evidence on behalf of the permittee, it is unlikely that a hearing officer would arrive at conclusions different from those reached by the Administrator, with the assistance of the Enforcement and Legal Divisions, when he signed the order instituting proceedings.

It may be pointed out, in conclusion, that in application cases, where the statutory requirements of opportunity for hearings and findings of fact are identical, the Administration does not hold hearings in the event of default, but merely enters an order of denial.

II. Hearings.

Time and Place of Hearings. When a hearing is requested, an order designating the time and place of hearing is prepared by the Trial Section for the signature of the Administrator. The rules require at least ten days' notice to be given, but, since the Administration's docket is rarely crowded, no more than the minimum is usually provided. In some cases, if a party so requests, a hearing will be held on less than the prescribed ten days' notice. An applicant who will be placed at a competitive disadvantage if his permit is not issued promptly, for example, will, on

request, be granted an immediate hearing.

Hearings are held either in Washington or in the field. For the most part, field hearings are had only if the Administration determines in the first instance that its convenience will be best served thereby. If there are many witnesses, for example, the Administration prefers to send a hearing officer and an attorney into the field rather than pay the traveling expenses of the witnesses. Parties frequently make request, either by letter, telegraph or telephone, that the hearing be held in the field. These requests are rarely granted and then only if an adequate showing is made by the petitioner that it will be impossible for him to present his case properly if the matter is heard in Washington. The number of applications for field hearings has decreased appreciably in recent months. This development reflects the preference of the handful of Washington attorneys who, having established reputations as experts in the field of liquor regulation, are retained as counsel in most cases before the Administration.

Right to Counsel. Parties are entitled to be represented by counsel, but every attorney practicing before the Administration is required to be a member of the bar of the Treasury Department.[40] In cases which have proceeded to hearing, applicants and respondents have almost invariably been represented by counsel; an attorney is not assigned to an unrepresented party, but the Administration's hearing officer endeavors to assist him in the presentation of his case.

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40. Regulations No. 1 (1935), Art. V., Sec. 3. If an attorney is not a member of the Treasury bar, the requirement is usually waived so as to permit him to proceed with the case. Further appearances by the same attorney will not be allowed, however, unless he has been admitted to the Treasury bar.

Hearing Officers and Trial Attorneys. When the Administration first began to function, the large volume of business with which it was confronted necessitated the employment as hearing officers of three attorneys with considerable trial experience. As the pressure of affairs slackened, the need for two of the hearing officers disappeared and, at the present time, only one hearing officer remains. Only when this one-man staff is on vacation, or is unavailable because of a sudden flurry of cases, is it necessary to designate another attorney to preside at a hearing. When that need arises, the Administration has a number of experienced attorneys, including the two former hearing officers, who can fill the breach. An effort is made by the General Counsel, it is said, to select an attorney who is not familiar with the facts of the case and who has no opinion concerning the merits. Since most of the available substitutes, including the former hearing officers, are members of the small staff of the Trial Section, it is recognized that the practice of the attorneys of discussing pending matters with each other necessarily reduces to a minimum the number of cases in which a potential hearing officer will be wholly ignorant of the matter to be heard.

The hearing officer is not advised to avoid conferring concerning the case with other members of the staff. As a matter of personal preference, however, he chooses to isolate himself as much as possible from the attorneys in the Trial Section before, during, and after hearings. He has made it a practice not to become too friendly with his colleagues and, as a rule, discusses only the most general problems with them. This policy of isolation is facilitated by the physical separation of the Trial Section, which is on the ninth floor of the building in which the

Administration has its offices, from the room occupied by the hearing officer on the fifth floor. Even when hearings are held in the field, the hearing officer is at pains to remain aloof from the trial attorney in traveling to and from the place of hearing.

Because of the almost complete physical separation of the hearing officer from the balance of the staff, he rarely knows anything about a case which has been designated for hearing until he receives a copy of the notice of hearing and the other pleadings. As a rule, therefore, his entire knowledge of the case is the information which he is able to glean from these papers. Occasionally, however, the hearing officer does confer with the trial attorney concerning some aspects of a case. The latter may request the hearing officer either to assist him in determining how he should attempt to establish certain points in the case or to give him what are in effect advance rulings on evidence questions.

The hearing officer does not take an active part in the direction of the proceedings, a matter which is left entirely to the discretion of the attorneys representing the Administration and the other parties.[41] He may attempt to clarify the issues if the hearing tends to wander off the beaten path, but his main function is to preside over, and not to direct the course of the proceedings. In an effort to perfect the record, the hearing officer questions witnesses freely at any time and attempts to assist counsel, both for the Administration and the parties, in their examination of witnesses and the introduction of exhibits.

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41. The Administration is represented at all hearings by a member of the Trial Section, usually the attorney who had handled the case from its inception. The trial attorney interrogates the witnesses for the Administration and cross-examines those of the parties. If a party is not represented by counsel, the trial attorney also cooperates with the hearing officer in assisting the unrepresented party in the presentation of his case.

Unnecessary and prolonged proof of uncontested issues are frequently avoided by prevailing upon opposing counsel to stipulate to the facts.

The hearing officer has power to rule on objections to evidence and on any motion incidental to the progress of the hearing, such as requests for continuances; he has no authority, however, to entertain any motion of substantial importance.

Conduct of Hearings. As far as may be judged from a limited sampling, hearings conducted by the Administration are marked by an easy informality. The representatives of the Administration and the parties generally appear to be extremely friendly, often address each other by their given names when off the record, and frequently indulge in bits of facetious asides. During the warmer months, the hearing officer and the trial attorney occasionally remove their coats, a luxury which possibly adds no more to the comfort of the representatives of the government than it detracts from the dignity of the proceedings. While reference is being made to trivia, it may be noted that smoking is permitted at Administration hearings, a privilege which is freely indulged in by the hearing officer as well as the other persons present. These matters are of no moment in themselves; but it is perhaps preferable on the whole that administrative hearings should be conducted with due regard for the traditions of their judicial counterparts, where no impairment of efficiency is involved.

Subpoenas. The issuance of subpoenas is governed by Section 9 of the Federal Trade Commission Act, which is applicable to the jurisdiction, powers and duties of the Administrator.[42] The Administration has had

42. Section 9 of the Federal Trade Commission Act authorizes any member of the commission to issue subpoenas requiring "the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." Witnesses are entitled to be paid the same fees and mileage that are paid witnesses in the federal courts.

very little occasion to exercise this authority and, in fact, subpoenas have not been utilized in more than a dozen cases in its history. The witnesses for the parties are generally the persons interested in the matter or others in sympathy with their position and almost invariably appear voluntarily. Similarly, the witnesses for the Administration are ordinarily its investigators or other government officials who testify without the use of compulsory process. The problem with which the Federal Trade Commission has been faced in the investigation of complaints has not occasioned much difficulty to the Administration; there has been little need to consider whether the statute authorizes the use of subpoenas for investigatory purposes, since the Administration has not often been required to deal with recalcitrant or uncooperative individuals. In a few instances, however, it has been necessary to provide investigators with subpoenas duces tecum.[43]

The rules of practice do not contain any provisions governing the issuance of subpoenas. Only the Administrator has authority under the statute to sign and issue subpoenas and all requests for process must therefore be directed to him. This requirement is generally discovered by the parties through the hunt and peck system; inquiry is made of the trial attorney or the hearing officer who advises the party that he is required to make written application for subpoenas to the Administrator. The request must indicate the reasons why the subpoena is required, and must show that relevant evidence is anticipated to be adduced from the

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43. Supra p. 17.

witness, or, if a subpoena duces tecum is desired, from the documents. While the Administrator purportedly considers all such requests, he has uniformly accepted the recommendations of the General Counsel, or other members of the Legal Division, as to the disposition to be made thereof.

Any person who refuses to obey a subpoena or to answer any lawful inquiry is subject to a fine of not less than $1,000 nor more than $5,000, or by imprisonment up to one year, or both.[44] The Administration may also obtain an order from a district court requiring a contumacious witness to testify or produce documentary evidence. Failure to obey this order is punishable as a contempt of court.

Depositions. Depositions have rarely been used in Administration proceedings although there is a likelihood, with the increase of hearings in Washington, that they will be in greater demand in the future. The Administrator has power, under Section 9 of the Federal Trade Commission Act, to order the taking of testimony by deposition, but few requests for the exercise of this authority have been made. No procedure has been prescribed for applications for orders to take depositions and, in fact, the rules of practice do not indicate the availability of this method of adducing proof. Since the only reference in the statute to the Administrator's authority in this respect is the clause in Section 2 (g), which merely states that "The provisions . . . of Sections 9 and 10 of the Federal Trade Commission Act" are applicable to the Administrator, it appears to be desirable that this matter, as well as the issuance of subpoenas, be covered by specific rules of practice.

The Administration has rarely seen fit to take testimony by

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44. Section 10 of the Federal Trade Commission Act.

deposition and, in the few cases in which it has availed itself of this procedural device, written interrogatories were employed. In the isolated instances in which depositions have been taken by parties, the Administration has not been represented, for budgetary reasons, at the taking of the testimony.

Evidence. Witnesses at Administration hearings are required to be under oath, which is administered by the hearing officer. They are subjected to cross-examination by counsel and the hearing officer. While the Administration's regulations contemplate adherence to the rules of evidence utilized in federal equity courts, it is very frequently deemed desirable that those rules be relaxed. This is particularly true of the hearsay rule. Evidence which is generally looked upon as incompetent is admitted either because it may later prove to be valuable or because it is the only evidence which can conveniently be obtained on an issue. In addition, evidence whose authenticity is subject to but little doubt, such as the contents of the reports of permittees submitted to the Administration, or statistical data compiled, but not yet published, by the Administration or other government agencies, are permitted to be incorporated bodily in the record; such documentary evidence is, of course, not subjected to the conventional test of cross-examination, although opportunity is given to produce rebutting evidence.

Complaint has been made by attorneys practicing before the Administration concerning the hearing officer's occasional refusal to rule immediately on objections to the admissibility of evidence. Since, under some circumstances, it is necessary to admit testimony which, while apparently irrelevant or incompetent at the moment, may later develop to be admissible, one may suggest a middle course. Where rulings or objections

are reserved, they should be made before the hearing is closed in order (1) to provide an opportunity for the presentation of rebutting evidence if the objections are overruled, and (2) to complete the record so that attorneys are in a position to know what evidence to discuss in their oral argument and briefs before the hearing officer.

Record of the Proceedings. A complete stenographic record is made of every hearing and, if held in Washington, a copy is furnished without charge to the parties. If the hearing is held in the field, the record is transcribed by contract stenographers and the parties must arrange to purchase a copy of the record if they desire to have one.[45]

The major efforts to shorten the record are made by the hearing officer, who attempts to limit the introduction of cumulative evidence and, if possible, to avoid unnecessary proof of elementary facts such as compliance by the Administration with statutory notice requirements. Stipulations are rarely used, although an examination of some records seems to indicate that many matters which were the subject of prolonged and laborious proof could have been readily disposed of by agreement between the parties. Many applications which are designated for hearing involve no issues of fact, the sole question being whether the facts constitute grounds for denial under the statute. In those cases, it would be profitable if a more determined effort were made by the Administration to secure a stipulation of the facts.[46]

After the hearing has been closed, but prior to action by the Administrator, the record may be reopened for the presentation of additional

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45. Regulations No. 1 (1935) Art. V, Sec. 2.
46. The practice of stipulating the entire case in suspension proceedings has previously been referred to. See supra, p. 33.

evidence. The granting of such requests, which are made to the hearing officer, depends upon the showing made by the applicant. Although the rules require that good reasons be given for the failure to produce the evidence at the time of the hearing, the attitude of the hearing officer is that he would reopen any hearing to permit a party to put in evidence which was really needed for the proper disposition of the case. Requests of this type have been very rare and have invariably been granted. They have been made, almost without exception, by the Administration, which has insisted upon adhering to the formal motion procedure prescribed by the rules although the gesture, under the circumstances, seems to be rather pointless.

Procedure After the Record is Closed. At the close of the hearing, the hearing officer advises the parties of their absolute right, under the Administration's rules of practice, to have oral argument and submit a brief before him. This privilege, in so far as it contemplates oral argument, has been availed of in almost every contested proceeding; even where parties have not been represented by counsel, they frequently have made statements at the termination of the hearing. Occasionally, but not often, the trial attorney has argued in opposition to the parties. Oral argument, which is recorded and made a part of the record, is generally directed to the issues of fact involved in the case and resembles summation at the close of jury trials. The opinion is widely held that the closing argument does not afford much assistance in the resolution of the issues because it is too general and usually does little more than emphasize mitigating factors. Persons acquainted with the practice are inclined to believe that oral argument, because it is usually poorly prepared, has very little effect upon the judgment of the hearing officer,

and it has even been suggested that the privilege is availed of by some attorneys mainly because they desire to impress their clients.

Briefs have rarely been filed before the hearing officer, although they would unquestionably be of greater utility to him than oral argument, and the conditions under which they are required to be submitted are entirely favorable. The rules provide that all briefs be filed within five days after the transcript is available, but the hearing officer uniformly exercises his discretionary power to extend this time and fixes the date of filing sufficiently in the future to provide for ample opportunity to prepare a brief. No restrictions on the type, size or contents of briefs are imposed, and only three copies need be filed.

Hearing Officers' Reports. As soon as practicable after the conclusion of the hearing, and usually no more than two weeks after the transcript of the record is available, the hearing officer prepares a report which is served on both the trial attorney and the parties.[47] The report contains a digest of the testimony of the important witnesses and the hearing officer's findings which deal with issues both of fact and law. Recommendations for final action are also generally incorporated in the report, but this is not an invariable practice. The attitude of the hearing officer is, apparently, to make conclusions of law and recommendations only if there are precedents which seem to be applicable to the case sub judice. While there is no invariable practice of avoiding the disposition of issues which involve policy considerations, there does seem to be a disinclination to resolve questions of novel impression.

The hearing officer's report is a one-man opus and is not subject, it is said, even to editing for form and style by any other member

47. Regulations No. 1 (1935), Art. IV, Sec. 2 (c)

of the Administration's staff. Rarely has the hearing officer been given any assistance by the parties; no procedure is provided for the submission of proposed findings and only on isolated occasions are suggestions for findings made in the briefs filed before the hearing officer or in any other manner.

Appraisal of the Examining System. The major problem raised by the examining system is whether determinations of issues of fact and of questions involving legal and policy considerations are made by the persons best fitted to make those decisions. Or, to pose the problem in a slightly different manner, does the hearing officer's report reflect his individual judgment as to questions of fact and, to the extent that it includes legal conclusions and recommendations, the judgment of the agency as to matters of law and policy? It is probable that both parts of this query are, with some qualifications, to be answered in the affirmative. There is nothing to indicate that any attempt is made to influence the hearing officer's judgment as to the proper resolution of issues of fact. While the Administration has, almost without exception, been successful in obtaining favorable findings of fact from its hearing officers, particularly in suspension cases, it is impossible to infer that these results have been occasioned by any interference with or supervision over the hearing officers.

Although the hearing officer's report is not reviewed by the agency prior to its service on the parties, it usually reflects the judgment of the Administration in so far as issues of law and policy are concerned, to the same extent as does the proposed decision of the Federal Communications Commission. In the first place, many cases involve recurring problems and, once the Administration has indicated the manner in

which it intends to dispose of these questions, it is a relatively simple matter for the hearing officer to apply the precedents to new cases. If questions of novel impression are raised, furthermore, the hearing officer frequently has at his disposal, if he chooses to avail himself thereof, an expression of the agency's attitude toward the legal and policy questions. The source of this information, in suspension cases, is the order instituting proceedings which, it will be recalled, represents the joint efforts of the legal and enforcement staffs as approved by the Administrator.[48] There is thus what amounts to an advance, if tentative, determination of some of the legal and policy questions; the notice of hearing states in effect that, if the facts are found to be as alleged, certain consequences will flow therefrom.

In some respects, however, the present system occasionally fails to provide the parties with a full and accurate description of the Administration's tentative views on these questions. This is particularly true of application cases in which the hearing officer is unable to ascertain from the notice of contemplated denial whether there has been a pre-determination of issues of law and policy. Furthermore, in suspension cases, the hearing officer does not always attempt to make recommendations, a matter which is of primary importance to the permittee. To the extent that the hearing officer declines to include in his report conclusions of law and recommendations, or is uncertain that the views he has taken coincide with those of the Administration, his report fails to provide the parties with an intermediate report to which they may take intelligent exceptions to serve as the basis for effective oral argument before the Administrator.

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48. Supra pp. 28-30

Since cases which are susceptible of the criticism are rare, and the hearing officer's report does, as a general proposition, reflect the views of the agency, there is no reason for suggesting the transplantation of the proposed-decision procedure of the Federal Communications Commission. There can be no question, however, that the use of the basic philosophy underlying that procedure would serve to improve the Administration's examining system. In those few cases in which the hearing officer's report is unlikely to incorporate the proposals of the agency, or makes no attempt to do so, it would be desirable if the hearing officer could discuss the legal and policy questions with the General Counsel and thus be able to include in his report views which would truly represent the tentative position of the Administration.

Exceptions and Oral Argument Before the Administrator. Exceptions to the hearing officer's report--which are taken in only some 20 per cent of the cases--may be filed by the Administration or the parties within ten days after the service of the report, a period which is usually extended upon request.[49] The exceptions are but rarely accompanied by a brief, because oral argument before the Administrator, which is the purpose for the taking of most exceptions, is given as a matter of right if application therefor is made at the time exceptions are filed.[50] For the most part, there has been little disagreement with the hearing officer's findings of fact; the objections have generally been made to his conclusions of law and recommendations. As a result, argument before the Administrator, in which the trial attorney always participates, has been concerned occasionally with questions of law and invariably with pleas

49. Regulations No. 1 (1935) Art. IV, Sec. 2 (c).
50. Id., Art. IV, Sec. 2 (d).

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50. Id., Art. IV, Sec. 2 (d).

for clemency.

The Administrator's Order. Every case in which action by the Administrator is essential, is carefully reviewed by him.[51] This is true not only of proceedings in which exceptions have been filed, but also of cases where there is no apparent disagreement with the hearing officer's report. In making his study of the case, the Administrator consults with no member of his staff except the General Counsel. It is not essential for any staff member to prepare a digest of the record, because that has already been done by the hearing officer. Furthermore, the Administrator reads the record in all contested cases--few of the records contain more than 300 pages of testimony--and even dips into the transcript in uncontested proceedings.

The Trial Section has no opportunity to present its views to the Administrator in cases in which exceptions have not been taken, except by way of the memorandum which is attached to the draft of the final order which is sent to the Administrator after the time for taking exceptions has elapsed.[52] This memorandum is not discursive; it merely states that the attached order contemplates that the case will be decided in a certain fashion and, if the assumption proves to be incorrect, a different order will be prepared. While there is no indication that this practice has been used as a device for the taking of secret exceptions, several significant reasons for its discontinuance may be advanced. In the first place,

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51. In the year 1938, which was the first normal year of the Administration's brief life, the Administrator was required to decide 10 application cases, 7 contested suspension cases, 17 stipulated suspension cases, and 70 non-user revocation cases. There is no indication that there will be any substantial variation from these statistics in the current year.

52. Any corrections to be made in the form or style of the hearing officer's findings, if they do not involve substantial alterations, are made in this manner rather than by taking exceptions to the report.

no practical need is served by placing the cart before the horse; the appropriate time for the preparation of a final order is after the Administrator has made his decision, and not before. If the Administrator did not have the benefit of an intermediate report, there might be some justification for providing him with a tentative final order. The very function of the hearing officer's report, however, is to furnish the Administrator with findings of fact and conclusions of law, which serve as a basis for his careful review of the record. Any inaccuracies in the findings or conclusions which are not sufficiently significant to move the trial attorney to take exceptions to the hearing officer's reports should either be discernible by the Administrator in the course of his deliberations, or else are so unimportant that the failure to make the requisite changes would occasion no loss. Moreover, to the extent that the Administrator disagrees with the tentative draft, and requests that changes be made therein, the present practice is wasteful and results in an unnecessary duplication of effort. In any event, the participation of the trial attorney in the preparation of the final order, since it is a potential source of criticism, should be discouraged; others are equally competent to re-draft the findings in the intermediate report to conform to the Administrator's concept of what they should be.

The Administrator has adopted the practice of not discussing cases with any one other than the General Counsel. He regards the latter as his personal attorney and, since he is not a lawyer himself, depends entirely upon the General Counsel's judgment on questions of admissibility and weight of evidence, conclusions of law, and interpretation of the statute. The Administrator is given no assistance by the General Counsel in the making of determinations of fact or in arriving at conclusions on

policy questions which involve non-legal considerations. The determination of how large a suspension period shall be imposed upon a guilty permittee, for example, is made by the Administrator alone.

No attempt is made to withhold from the Administrator any extra-record information bearing on cases awaiting decision. The general file maintained for the applicant or permittee is sometimes examined by the Administrator for "background" purposes[53] and, while he has been advised that he may not consider information dehors the record, there is no way in which to gauge what effect, if any, such material has upon the resolution of close issues of fact. To the extent that this practice may involve a potential danger to the right of litigants to have their cases decided on the basis of the record, it is suggested that a more determined effort be made to isolate the Administrator from all extra-record material.

The Administrator's final order contains findings of fact and conclusions of law, but does not include an argumentative opinion stating the reasons for the decision. Since the number of contested cases in which final orders are issued is extremely small, and there is no other practical barrier to the preparation of decisions resembling those of a court, the adoption of the practice of incorporation in the order of the reasons underlying the Administrator's determination appears to be desirable. This procedure could serve as a check upon the exercise of discretion and judgment in a field where the range of discretion is considerable. There can be little doubt that the act of deliberation

53. The general file contains any correspondence that may have been received from members of Congress concerning the merits of the case. It is apparently a rather common practice for legislators to indicate their interest in the granting of pending applications for permits by communicating, either by letter or telephone, with the Administration. There is less concern demonstrated by Congressmen in suspension proceedings, probably because they prefer not to meddle with matters as opprobrious as violations of the liquor laws.

is more likely to be performed with a maximum of thoroughness and care when the reasons for the conclusions are required to be articulated and subjected to appraisal by critical observers. A further advantage to be derived from the preparation of argumentative opinions is the development of uniformity in the application of the law. It is not suggested that the Administration pursue a policy of rigid adherence to the doctrine of stare decisis; all that is contemplated is that the decisions of the agency indicate to the public what factors have motivated the Administration's action and, if in apparent conflict with previous rulings, the reasons for such variation.

Petitions for Reconsideration. Petitions for reconsideration, though permissible under the rules of practice,[54] have rarely been filed, and then only in cases in which the parties have discovered new evidence on the basis of which reopening of the hearing was requested. These petitions have always been granted and have resulted in the designation of the matter for further hearing.

54. Regulations No. 1 (1935) Art. IV, Sec. 5.

PART II

RULE-MAKING

Introduction. All of the specific rule-making powers conferred upon the Administrator by the statute have been exercised, although the task was not completed until more than three years after the creation of the Administration. Regulations No. 1, the rules of practice and procedure, were issued almost immediately after the Administration began to function, but Regulations No. 8, defining the "usual credit period" in the industry as related to the "tied house" provisions of Section 5 (b), were not promulgated until near the close of 1938.[55] The regulations defining what constitutes non-industrial uses of alcohol were also issued at an early stage of the Administration's activities; these rules, which are not based on a specific statutory authorization, do not implement the Act but merely define the jurisdiction of the Administration thereunder.[56]

The most important regulations issued by the Administration are those governing the labeling and advertising of wines,[57] distilled spirits,[58] and malt beverages.[59] The labeling regulations are divided into two parts: (1) Standards of identity for each of the various types

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55. The delay was occasioned by very practical considerations. The industry was in its infancy in 1935 when the Administration was established, and the determination of "usual credit periods" was patently impossible until credit practices began to crystallize, a development which naturally was several years in the making.
56. Regulations No. 2 were drafted with the very active cooperation of the Alcohol Tax Unit, which has jurisdiction over industrial uses of alcohol.
57. Regulations No. 4 (1935).
58. Regulations No. 5 (1936).
59. Regulations No. 7 (1936).

of alcoholic beverages; (2) matters which are required to appear or which are prohibited from appearing on labels. The mandatory information is intended fully to apprise the consumer of the identity and quality of the product. Other material appearing on labels must not be false, misleading, obscene or indecent, and the use of unenforceable guarantees, therapeutic claims, scientific analyses, and other information tending to mislead the consumer is banned. The advertising regulations are patterned on the labeling rules, paralleling in many respects the requirements or prohibitions of the latter. Thus, the advertising regulations prohibit misleading references or representations, disparaging statements, and the like.

The statute requires that a public hearing precede the issuance of all regulations authorized by Section 5. For this reason, the labeling and advertising regulations, the credit rules, and the regulations prescribing exceptions to the prohibition against the giving of things of value[60] were all the subject-matter of hearings. All other regulations promulgated by the Administration, including the rules of practice, the definitions of non-industrial uses of alcohol, and the regulations governing the sale of distilled spirits in bulk,[61] were not considered at public hearings and, in fact, were not even discussed informally with members of the industry because they involved problems upon which persons outside the agency could shed little light, if any. It is probable, however, that any proposed amendments to the procedural rules will be discussed with the handful of attorneys who have developed a substantial practice before the Administration since the issuance of the rules of 1935.

60. Regulations No. 6 (1936).
61. Regulations No. 3 (1935).

Preliminary Stages of the Rule-Making Process. The original exercise by the Administrator of his several statutory powers to issue regulations always resulted from proceedings which were instituted within the agency. Proceedings leading to the amendment of regulations, however, have been initiated either on the request of industry members or by the discovery of staff members of flaws in the existing regulations.

Some preliminary consideration is given to proposed regulations prior to the holding of a public hearing thereon. All available information contained in government or trade publications is collected and, in some situations, questionnaires are disseminated among industry members for the purpose of obtaining additional data. Statistical abstracts and analyses are prepared by the staff on the basis of the answers to such questionnaires. In connection with some regulations, notably those dealing with credit periods, a survey of the conditions existing in the states was solicited and received from all of the state authorities responsible for the administration of local laws. Proposed regulations are frequently, but not invariably, discussed with representatives of the industry in order to obtain additional information as well as their opinions as to the feasibility of the proposed regulations. The assistance of the Alcohol Tax Unit is also secured, particularly if there is any need for the making of chemical analyses; the possibility of conflict with the liquor tax laws is always discussed with the Alcohol Tax Unit.

The information collected by the agency is examined and discussed by the Administrator, the Administrative Technical Assistant, and the General Counsel, who constitute an informal group for the consideration and drafting of rules. If, on the basis of the available informational material, there

appears to be sufficient reason for contemplating the issuance of the proposed rules, the matter is included among the issues to be discussed at an early public hearing.[62]

Notices of Hearing. At least thirty days prior to a rule-making hearing, notice thereof is given to all parties likely to be interested in the proposed regulations. Thus, if the regulations would affect distilled spirits producers, all permittees with authority to manufacture those products, trade associations of such permittees, and all other persons whose names have been placed on the Administration's mailing list, are mailed a copy of the notice of hearing. The notice is also published in the Federal Register and is incorporated in a press release which is distributed to trade journals as well as ordinary newspapers.

The notice states the time and place of the hearing and, if proposed amendments are to be discussed, contains a reference to the regulations to be reconsidered and the ultimate end sought to be achieved by the amendments. A fuller explanation of a proposal is given if necessary, in which case the item in the notice is in reality a paraphrase of the proposed amendment. Beyond this no attempt is made tentatively to formulate

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62. The Administration does not hold a rule-making hearing unless there is a matter of great immediate import or if it has accumulated a sufficient number of proposed amendments to justify the expenditure by industry members of the time and money necessarily involved in attending hearings in Washington. In the past few years, there have been two hearings held annually.

proposed regulations prior to the hearing or at any other time before the hearing has been terminated.[63]

Where the Administration has noticed for hearing a proposal for the amendment of a regulation, with the primary purpose of obtaining additional information, it is obviously impractical to prepare drafts of proposed regulations to which the parties may direct their statements. If, on the other hand, the Administration's research and investigational work has advanced sufficiently to enable the attorney preparing the notice of hearing to paraphrase the proposed regulation, it would appear to be desirable, and to involve little additional trouble, for the agency to provide a tentative draft to the persons regulated.

Conduct of Public Hearings. Hearings have always been well attended by permittees and trade associations. On some occasions, the public interest has been represented by the Alcohol Tax Unit and by state liquor agencies as well as by the Administration. In many hearings such other government agencies have actively participated in the proceedings; in the credit hearing, for example, the state agencies not only submitted considerable documentary material, but also presented testimony on the relevant issues.

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63. The sole exceptions to this practice were the proposed regulations which constituted the basis of discussion at the first few public hearings. Rules had been formulated under the Federal Alcohol Control Administration (the NIRA predecessor of the present Administration) and many interpretative rulings had been made thereon. Since the subject matter of the new regulations was identical in most respects, and the scope of the hearings was enormous, it was felt to be desirable to have proposed regulations at which parties might direct their criticisms.

Since public hearings invariably are concerned with a number of rules proposals, the Administration has adopted the practice of receiving all the evidence relating to a given issue before listening to the others. When the hearing convenes, each person is given a card on which he is instructed to indicate the issues on which he desires to be heard. These cards are assembled and, when the names of all parties interested in the first issue have been listed, the hearing is begun.

The Administration is represented at public hearings by the Administrator, the Administrative Technical Assistant, and the General Counsel. At the inception of the hearing, the Administrator makes an opening statement which incorporates a brief description of the issues. He then calls upon the persons who have indicated their desire to be heard on the first issue, and turns them loose. The witnesses are not sworn, and are permitted to read prepared statements or to introduce into the record any other ex parte material, such as statistical summaries of answers to questionnaires circulated by them among industry members.

An examination of the records of the public hearings held by the Administration indicates that they are conducted in the same manner as hearings before Congressional committees. The parties are entitled to be heard, but they have no right to cross-examine witnesses. The witnesses are interrogated only by the representatives of the Administration; if one of the parties desires to ask a question, the query may be submitted in writing to the presiding officers and, if thought to be of any value, is then submitted to the witness.

The use by the Administration of legislative hearing procedure was never questioned until a hearing held in March, 1939. At that time,

the argument was made that, since the statute required the Administrator "to give reasonable public notice, and afford to interested parties opportunity for hearing" prior to issuing regulations, the procedure followed at rule-making hearings must include the attributes of adversary proceedings. It was contended that the following procedural steps should be followed at public hearings: (1) Witnesses should be sworn; (2) opportunity to cross-examine witnesses should be given; (3) only evidence in the record should be considered; (4) opportunity to present rebutting evidence should be given; (5) findings should be made only if supported by "substantial evidence." The argument that rule-making hearings should assume a form which is neither applicable nor suitable to the legislative process, was properly rejected by the Administration.

Procedure Following Public Hearings. Concluding oral arguments are not permitted at the close of public hearings, but the parties are always allowed to file briefs and are usually given thirty days in which to do so. The record is available to any party who is able and sufficiently interested to purchase a copy from the contract reporter who prepared the transcript.

The practice generally followed by the Administration is to assign an attorney to the task of studying the entire record, the exhibits, and briefs submitted by the parties. The testimony is then summarized and copies of the digests are circulated among the Administrator, General Counsel, Administrative Technical Assistant, and any other members of the staff who take an active part in the consideration of rules matters. These digests are studied and the proposals fully considered and discussed, after which the determination is made either to issue the regulations or to

reject the proposals.

In arriving at its determination, the Administration does not regard itself to be restricted by the record. As a matter of fact, however, most informational material which is taken into consideration is incorporated in the record. Even expressions of opinion received prior to the hearing are introduced as exhibits, although there seems to be little point in the current practice of waiting until the very end of the hearing before introducing such communications. If the purpose of placing this type of material in the record is to give the parties an opportunity to present rebutting evidence, it is an end which clearly cannot be achieved by awaiting the termination of the hearing before even showing the material to the parties. If, on the other hand, the reason for incorporating this material at any time is to have the record reflect the Administration's "case", it fails in this purpose as well. For one thing, all of the informational material which the Administration takes into account is not necessarily a part of the record; at least such information and data as may come to the Administration's attention after the hearing is terminated, are not included in the record. Furthermore, the most important raw material which goes into the manufacture of regulations, the value judgments of the rule-makers, cannot possibly be reduced to "fact" terms.

Before departing from the discussion of the manner in which the agency disposes of rules matters, and the types of material taken into consideration in the course of the legislative process, it should be noted that the Administration, not unlike other deliberative bodies, is not immune from the pressure of lobbying. Attempts to affect the agency's judgments are made sub rosa not only directly by the lobbies maintained by the

industry, which are among the most potent in the country, but also indirectly through the legislative and executive branches of the government. It is impossible, of course, to gauge the precise effect of these efforts upon the agency, but the pressure exerted through other official groups is said unquestionably to have some influence. It has been asserted that so long as the annual appropriation assigned to the Administration, as well as the very existence of the agency, depend upon the pleasure of members of Congress, there is a tendency to lend an attentive ear to the words of persons who wield substantial political power, for the Administration is less securely established in the governmental hierarchy than are many others of the Federal agencies.

Disposition of Rules Matters. If, after the proposed regulation has been fully discussed with the staff, the Administrator determines that the proposal should be rejected, a "decision" is issued in which the reasons for the unfavorable action are sometimes given, particularly if the proposal has merely been temporarily tabled. This "decision" is published in the Federal Register and mailed to all interested parties, as well as publicized by means of a press release.

Should the determination of the Administrator be that the regulation be promulgated, the task of drafting the rules is undertaken by the Legal Division or the Administrative Technical Assistant. After the draft has been reduced to a satisfactory form, it is submitted to the Secretary of the Treasury, as required by the statute, for his approval. There has been very little difficulty occasioned by this additional step in the administrative process; even the necessity for conferences between the Administration and the legal staff of the Treasury Department has not occurred

with any frequency. With only one exception, the review by the Treasury Department has been directed to the discovery of any possible points of conflict between the proposed regulations and the customs and internal revenue laws, a matter which the Administration always discusses with the Alcohol Tax Unit prior to holding a public hearing on the regulations. The one exception, which resulted in the refusal of the Secretary to approve the regulations, involved a rule whose issuance was protested by the State Department for diplomatic reasons. The review by the Secretary of the Treasury, which generally consumes about three weeks, appears to be a procedural step which should be eliminated from the statute, a conclusion which is confirmed by the amendments to the Act, not yet effective, which make the Administration an independent agency.[64]

Issuance of Regulations. After the Secretary of the Treasury has approved the regulations, they are published in the Federal Register and copies are mailed to all permittees likely to be affected, as well as to all other persons on the mailing lists. Press releases are distributed to newspapers and trade journals in order to assure the notification of all interested parties.

A future effective date is invariably assigned to regulations, the time depending upon the subject matter of the rules. Some regulations, such as those involving substantial modifications of the labeling requirements, may require a considerable period of adjustment for permittees affected thereby. For that reason, regulations are usually not made effective for at least thirty days and, in some instances, for six months.

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64. Supra, note 3.

The Administration has followed the policy of issuing interpretations of new regulations for the information and assistance of the trade.

Revision and Amendment of Regulations. There is no established procedure for reexamining existing regulations. The Administration is on the constant lookout for flaws in its rules and, from time to time, inadequacies are uncovered in the course of the enforcement of the Act. Applications by interested persons for amendments to the regulations are accepted by the agency, but they have no procedural effect. Such applications are generally made by trade associations and prominent industry members and may take the form of either written or oral requests. It is entirely discretionary with the Administration whether the suggestion will be incorporated in the issue to be discussed at a public hearing.

The holding of two hearings on proposed amendments to the rules, in both 1937 and 1938 does not represent a fixed policy of the Administration, but has been occasioned solely by the fortuitous circumstance that there have been sufficient issues on which to hold revision hearings about every six months.

The procedure followed in revising regulations is identical in all respects with that employed in their original issuance.